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No. 86-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RANDALL F. CARSON and SUSAN CARSON,

Petitioners,

vs.

JOHN R. BLOCK, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITIONERS' MEMORANDUM IN REPLY

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PETITIONERS' MEMORANDUM IN REPLY

1. The Respondents argue that this Court's decision in *Lyng v. Payne,* 476 U.S. ____, 90 L.Ed.2d 921 (1986) forecloses Petitioners' contention that 7 *U.S.C.* §1981a conferred upon them a property interest by "squarely reject(ing) the farmers' claim that they had been denied due process because of allegedly inadequate notice of the loan program." (Res. 4). That is not the case. First, *Lyng v. Payne* had nothing to do with 7 *U.S.C.* §1981a. Second, Petitioners' claim in this case relates not to notice of statutory benefits, but to their right to be heard on an application for statutory benefits, assuming, as Petitioners do, that they had notice. As argued in their Petition, this Court's dictum in *Lyng v. Payne* that it has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the due process clause of the Fifth or Fourteenth Amendments" illustrates the importance of the question posed by the Petitioners. *Lyng v. Payne, supra,* 90 L.Ed.2d at 936. The Petition for Certiorari

asks this Court to hold that applicants for statutory benefits, where they are identified as beneficiaries under the statutory scheme and where substantive limitations are placed on official discretion, have a claim of entitlement protected by the due process clause of the Fifth Amendment.

2. Evidently conceding that due process may have "required something more than notice of the opportunity to apply for loan deferral assistance" (Res. 5), Respondents argue that Petitioners' six million dollar damage claim[1] could not succeed because (i) Petitioners did not avail themselves of administrative remedies and (ii) Respondents are protected by *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) qualified immunity. (Res. 5). The first point is incorrect because, as is clear from all the cases which have construed 7 *U.S.C.* §1981a enacted in 1978[2], Respondents had not implemented or did not have available the loan deferral program mandated by that section at the time Petitioners made their application for its benefits in December, 1981. (Pet. App. A8). There were, therefore, no benefits recognized by the FmHA, the denial of which Petitioners could have administratively pursued. *Id.*

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[1] Respondents, by reference to the amount prayed in Petitioners' ad damnum seem to scoff, as did the court of appeals, at the sum. However, at the time the complaint was filed, Petitioners, the heads of a household of four, alleged they had, as a proximate result of Respondents' actions, been dispossessed of their 145 acre farm, been dispossessed of their machinery and equipment, been dispossessed of their dairy parlor, and had been dispossessed of their 140 head of dairy cattle. Petitioners also alleged that they stood at the brink of the loss into the indefinite future of their livelihood and, perhaps less tangibly, but equally real, the loss of their way of life as family farmers. See *Carey v. Piphus,* 435 U.S. 247, 253 (1978).

[2] See *United States v. Hamrick,* 713 F.2d 69 (4th Cir. 1983); *Ramey v. Block,* 738 F.2d 756 (6th Cir. 1984); *United States v. Markgraf,* 736 F.2d 1179 (7th Cir. 1984); *Allison v. Block,* 723 F.2d 631 (8th Cir. 1983); *Matzke v. Block,* 732 F.2d 99 (10th Cir. 1984); and *Curry v. Block,* 738 F.2d 1556 (11th Cir. 1984).

3. Respecting qualified immunity under *Harlow v. Fitzgerald, supra,* Respondents appealed to the court of appeals under *Mitchell v. Forsyth,* 472 U.S. ____, 86 L.Ed.2d 411 (1985) from the district court's collateral order denying their motion for summary judgment on the issue of qualified immunity. Pet. 4, Pet. App., A-2, 3. The principal issue argued by the Respondents in the court of appeals was whether the Respondents were qualifiedly immune by reason of Petitioner's due process rights not yet being "clearly established". (Respondents' Brief in the Court of Appeals). The principal issue defended by Petitioners in the court of appeals was the district court's denial of Respondents' motion for summary judgment on the issue of qualified immunity. (Petitioners' Brief in the Court of Appeals). However, that issue was not addressed by the court of appeals, that court holding *inter alia* instead that 7 *U.S.C.* §1981a created no constitutionally protected property interest. Pet. App. A1-A8. That holding necessarily obviated any concern whether Respondents were qualifiedly immune respecting Petitioners' Fifth Amendment due process claim.

However, Petitioners submit that were they to ultimately prevail on the property interest question, qualified immunity would again become a live question in the context of this case. As such, Petitioners suggest that this Court's observation in *Davis v. Scherer,* 468 U.S. 183, 193, n. 11 (1984) that "state (or federal) law may bear upon a claim under the due process clause when the property interests protected by the Fourteenth (or Fifth) Amendment are created by state (or federal) law" posits the premise from which Petitioners should surmount Respondents' qualified immunity defense. As further stated by this Court in *Davis v. Scherer, supra,* "officials become liable for damages only to the extent that there is a clear violation of their statutory rights that give rise to the cause of action for damages." *Davis, supra* at 194, n. 12. In turn, this Court in *Davis, supra* said that "neither state nor federal officials lose their immunity by violating the clear command of a statute or regulation — of federal or of state law — unless that statute or

regulation provides the basis for the cause of action sued upon." *Davis v. Scherer, supra,* 468 U.S. at 194, n. 12. As construed by, for example, the Seventh Circuit in *Lojuk v. Johnson,* 770 F.2d 619 (7th Cir. 1985), the *Davis v. Scherer* formulation requires a determination whether or not the statute at issue "has some bearing on the constitutional right, as when the statute creates a substantive right that the due process clause then protects." *Lojuk v. Johnson, supra* at 629.

Petitioners contend that the statute in question, 7 *U.S.C.* §1981a, created a constitutionally protected property interest in their being considered for loan deferral benefits. When Respondents failed to implement or have available that statutory program resulting in Petitioners' application for benefits being summarily denied without any process at all, Petitioners were denied property without due process of law under circumstances where Respondents' violation of the statute "provid(ed) the basis for the cause of action sued upon." *Davis v. Scherer, supra* at 194, n. 12. Nevertheless, because the court of appeals did not address the *Harlow v. Fitzgerald* qualified immunity question, it is not before this Court. But, contrary to the Respondents' suggestion, Petitioners submit they can meet the *Harlow v. Fitzgerald* standard should it again present itself. Therefore, Petitioners respectfully submit that this Court should not take into account Respondents' anticipated qualified immunity defense in passing on their Petition for Certiorari.

For the reasons stated in their Petition and the reasons stated in this Reply, Petitioners respectfully submit that their Petition for the issuance of a writ of certiorari should be granted.

Respectfully submitted,

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December 3, 1986